

ORIGINAL CIVIL.

Before Mr. Justice Norris.

RAM CHUNDER DUTT v. DWARKANATH BYSACK AND OTHERS.*

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January 14.

Registrar of High Court, Authority of—Power to execute conveyance and enter into covenants on behalf of infants and persons refusing to execute—Defects of title known to purchaser at time of sale—Covenants for title and quiet enjoyment—Purda-nashin, when not bound by conveyance executed by her containing covenants for title and quiet enjoyment—Civil Procedure Code (Act XIV of 1882), ss. 261, 262—Rules of Court (Belchambers' Rules and Orders), Nos. 341 and 436.

The Registrar of the High Court has authority, when so directed by an order of Court, to execute a conveyance on behalf of a party refusing to do so, so as to pass his estate, if any, but has no authority to bind him by entering into any covenants on his behalf.

The power of the Registrar to execute such a conveyance rests upon statutory authority.

General covenants for title and quiet enjoyment extend to the case of a defect known to the purchaser at the time of the sale, unless the intention of the parties that they should not do so is clearly expressed in the covenants themselves.

"Conveyance," as used in Rule 436 (Belchambers' Rules and Orders), means such an instrument as may be necessary to transfer the estate, if he has any, belonging to the person on behalf of whom the Registrar executes the transfer to the purchaser.

Circumstances under which a *purdha-nashin* lady will be relieved from liability under covenants contained in a conveyance executed by her.

D, an heir of one *X*, a deceased Hindu lady, sold and conveyed to *M*, in March 1878, a moiety in certain premises belonging to the estate of *X*. Subsequently a decree was made for partition of the estate left by *X* in a suit to which *D*, *A*, *R*, *G* and *S* were parties, and an order was made in that suit directing the premises, of which *D* had so sold a moiety, to be sold by the Registrar, and the parties were directed to join in the conveyance, the Registrar being directed to approve and execute the same on behalf of *G* who was an infant. At the sale, the plaintiff purchased the premises, and thereafter *D* refused to execute the conveyance, which included the usual covenants for title and quiet enjoyment. A summons was thereupon taken out against him, and an order was made directing the Registrar to execute the conveyance on his behalf. The conveyance was then executed in September 1885 by *A*, *S* and *R*, and by the Registrar on behalf of *D* and the minor

* Original Civil Suit No. 150 of 1888.

G. In a suit instituted by *M*, under the conveyance of 1878, the Court held that he was entitled to possession, as against the plaintiffs, of the moiety of the premises covered by his conveyance. The plaintiff, therefore, brought a suit against *D*, *A*, *R*, *G* and *S* to recover damages for breach of the covenants for title and quiet enjoyment. It was not found that *R* had any good independent advice in the matter, or that she clearly understood the nature of the contract she was entering into, and the liabilities she was taking upon herself.

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Held that, although the Registrar had authority to execute the conveyance on behalf of *D* and *G*, he had no authority to enter into the covenants on their behalf, and that the suit should be dismissed as against them.

Held, also, that having regard to the position of *R*, the suit should also be dismissed as against her.

THIS was a suit to recover damages for breach of covenants for title and for quiet enjoyment, and the circumstances under which it came to be instituted were as follows:—

Anundmoye Dassee, who was the widow of one Joykishen Bysack, died on the 30th of April 1871, leaving a son, Dwarkanath; four grandsons by a son, Gopal Lal Bysack, who had predeceased her, *viz.*, Amrita Lal Bysack, Surendra Lal Bysack, Monohur Lal Bysack, and Girendra Lal Bysack; a grandson, Juggutdoollub Sett, and a grand-daughter, Panna Dassee, children of a daughter, Shamsoondery Dassee, who had also predeceased her.

Anundmoye left a will, dated the 10th of February 1871, of which she appointed Dwarkanath and Amrita Lal executors.

Monohur Lal died unmarried and without issue in July 1876, leaving his mother Rajluckhee Dassee, his heiress.

Probate of Anundmoye's will was granted to Amrita Lal on the 1st of August 1881, and to Dwarkanath on the 13th of August 1881.

Amongst other property possessed by Anundmoye, purchased out of her stridhan and purporting to be disposed of by her will, was a piece of garden land known as No. 22, Machooa Bazar Street, in the town of Calcutta.

On the 28th of March 1878, Dwarkanath sold and conveyed to one Obhoy Churn Mullick a moiety of No. 22, Machooa Bazar Street, for Rs. 3,000.

On the 21st of August 1882, Amrita Lal instituted a suit in the High Court (being suit No. 470 of 1882) against Dwarkanath, charging him with various acts of misfeasance, particularly with

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the fraudulent conveyance of the 28th of March 1878, and asking for an injunction restraining him from interfering with Anundmoye's estate, for the appointment of a receiver, and for the administration of the estate by the Court. Surendra Lal, Girendra Lal, Rajluckhee Dassee, Juggutdoolub Sett and Panna Dassee were made defendants in that suit.

Anundmoye's will directed, *inter alia*, that the balance of the income of the estate, after deducting certain payments and expenses, "should be applied to the expenses of the family; but that if any of her sons and grandsons should become separate in food, the sons and grandsons should divide, take, and enjoy the balance of such income according to the shastras."

The parties seemed to have agreed as to what were their respective rights under the will, and, on the 17th of April 1883, Amrita Lal applied to the Court, on petition, that a decree should be made in the suit declaring that under Anundmoye's will Amrita Lal, Surendra Lal and Girendra Lal, were each entitled to a one-eighth share of her estate absolutely; Rajluckhee Dassee, as the heiress of Monohur Lal, to a one-eighth share for the estate of a Hindu widow; and Dwarkanath to the remaining half; and that certain arbitrators should be appointed to take the accounts and partition the estate.

All the defendants acquiesced in the prayer of that petition, and the Court ordered a reference to the Registrar to enquire and report whether the terms of the proposed settlement were for the benefit of such of the defendants as were infants.

On the 18th of July 1883, the Registrar reported that the terms of the proposed settlement were for the benefit of the infant defendants.

On the 30th of August 1883, on the cause coming on for further directions on the report of the Registrar, a decree was made according to the terms of the petition. The arbitrators made their award on 9th February 1885.

The award directed, *inter alia*, that a sufficient portion of the immoveable property, mentioned in a schedule thereto annexed, should be sold by the Registrar of the Court by public auction for the payment of the debts thereinbefore mentioned and for the costs of the suit.

Amongst the immoveable properties mentioned in the schedule was "a portion" (*i.e.*, Anundmoye's divided portion) "of the premises No. 22, Machooa Bazar Street, containing by estimation 16 cottas 9 chittacks and 35 square feet."

The cause came on for judgment on the award on the 2nd of March 1885, when it was, amongst other things, "ordered and decreed by consent that the divided share of Sreemutty Anundmoye Dassee, deceased, the testatrix in the pleadings mentioned, in the premises No. 22, Machooa Bazar Street, be sold by the Registrar of the Court to the best purchaser that he can get for the same;" and it was further "ordered and decreed with the like consent that all proper parties do join in the conveyance of the said premises, as the said Registrar shall direct, if the parties differ about the same;" and it was further "ordered and decreed with the like consent that the Registrar of this Court do approve of and execute the conveyances of the properties to be sold by him as aforesaid for and on behalf of the infant defendants Surendra Lal Bysack and Girendra Lal Bysack."

The Registrar duly advertised the premises No. 22, Machooa Bazar Street, for sale, and, on the 4th of July 1885, they were sold by him, under certain conditions of sale then produced, and were purchased by the plaintiff for Rs. 7,000.

The sale was confirmed by an order of Court, dated the 17th of July 1885. A draft conveyance of the premises, No. 22, Machooa Bazar Street, was prepared by the plaintiff's attorney and forwarded to Dwarkanath Bysack's attorney, Baboo Moraley Dhur Sen, for approval on his (Dwarkanath's) behalf. On the 5th of August 1885, Baboo Moraley Dhur Sen returned the draft to the plaintiff's attorney "approved as altered."

The proposed parties to the conveyance were Dwarkanath Bysack and Amrita Lal Bysack, as executors of Anundmoye's will of the first part, Dwarkanath, Amrita Lal, Surendra Lal, Girendra Lal, as heirs and legal representatives of Anundmoye, and Rajluckhee Dassee as heiress and legal representative of the estate of Monohur of the second part, and the plaintiff of the third part.

The draft conveyance contained the following covenants: "And the said parties hereto of the first and second parts do and each

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of them doth hereby for themselves himself and herself their his and her heirs executors administrators and assigns covenant declare and agree with the said purchaser " (that is the plaintiff) " his heirs executors administrators and assigns in manner following that is to say that for and notwithstanding any act deed matter or thing by the said parties hereto of the first and second parts or any or either of them or their her and his ancestors made done and performed they the said parties hereto of the first and second parts or some or one of them now have or hath in themselves himself and herself good right full power and lawful and absolute authority to grant release and convey the said piece or parcel of land hereditaments and premises with the appurtenances unto and to the use of the said purchaser his heirs representatives and assigns for ever in manner aforesaid and according to the true intent and meaning of these presents and that it shall and may be lawful for the said purchaser his heirs executors administrators and assigns from time to time and at all times hereafter peaceably and quietly to enter into and have hold occupy possess and enjoy the said piece or parcel of land hereditaments and premises hereby released or intended so to be with their appurtenances and to receive and take the rents issues and profits thereof and every part thereof without any let suit trouble eviction claim or demand whatsoever of or by the said parties hereto of the first and second parts or any person or persons lawfully claiming or to claim by from under or in trust for her him and them and free and clear and freely and clearly discharged and exonerated or otherwise by the said parties hereto of the first and second parts their heirs executors administrators representatives and assigns well and sufficiently saved and kept harmless of from and against all former and other gifts grants bargains uses trusts judgments execution sums of money and all other estates titles troubles charges and incumbrances whatsoever had made executed or knowingly or willingly suffered by the said parties hereto of the first and second parts or any person or persons lawfully claiming or to claim from under or in trust for them."

This covenant was approved by Baboo Moraley Dhur Sen on behalf of Dwarkanath. On the 29th of August 1885, Baboo

Moraley Dhur Sen, on behalf of Dwarkanath, wrote as follows to the plaintiff's attorney :—

“7, CHURCH LANE, CALCUTTA,
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BABOO PREONATH GHOSE.

DEAR SIR,

I FIND that from an oversight I approved of your client's conveyance of Lot No. 1 on behalf of my client. He cannot execute it, and I fancy you must obtain an order authorising the Registrar to approve of and execute the conveyance on behalf of my client.

Yours faithfully,
MORALEY DHUR SEN.”

On the 4th of September 1885, the plaintiff's attorney took out a summons as follows :—

“SUIT NO. 470 OF 1882.

In the High Court of Judicature at Fort William in Bengal.

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LET all parties concerned attend before the Sitting Judge in Chambers in the Court-house, on Tuesday, the 8th day of September instant, at the hour of 10 o'clock in the forenoon, on the hearing of an application on the part of Ram Chunder Dutt, the purchaser of the property consisting of Lot No. 1, at a sale held herein by the Registrar of this Honourable Court for an order that the said Registrar do sign and execute the conveyance of the said property, being Lot No. 1, as aforesaid for and in the name of the defendant Dwarkanath Bysack, as one of the executors to the estate of Sreemutty Anundmoye Dassee, deceased, and also as one of her heirs and legal representatives, and that the said defendant, Dwarkanath Bysack, do pay personally the costs of and incidental to this application to be taxed by the taxing officer of this Honourable Court.

Dated this 4th September 1885.

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This summons was taken out by Preonath
 Ghose, applicant's attorney, against Baboo
 Moraley Dhur Sen, attorney for the defendant } J. PIGOT.
 Dwarkanath Bysack.

GROUND—*Affidavit of Ram Chunder Dutt.*

This summons was duly served on Baboo Moraley Dhur Sen on the 5th and was heard by Pigot, J., on the 8th of September 1885. At the hearing an affidavit of the plaintiff's, containing the following paragraphs, was filed in support:—

“That on the 27th day of July last, my attorney, Baboo Preonath Ghose, sent a draft conveyance of the said Lot No. 1 for the approval of Baboo Moraley Dhur Sen, attorney for the said defendant Dwarkanath Bysack.”

“That on the 5th day of August last, my said attorney received a letter from the said Baboo Moraley Dhur Sen, enclosing the said draft conveyance duly approved as altered on behalf of his client, the said defendant Dwarkanath Bysack.”

“That since the said 5th day of August last, my said attorney received the said draft conveyance duly approved by the attorneys for the plaintiff, and the said defendants Sreemutty Rajluckhee Dassee and Surendra Lal Bysack, and also by the said Registrar of this Honourable Court on behalf of the said infant defendant, Girendra Lal Bysack.”

“That on the 29th day of August last, my said attorney received a letter from the said Baboo Moraley Dhur Sen, a copy of which is as follows:—

[The letter referred to is the one already set out (1)].

Dwarkanath did not appear either in person or by counsel or attorney on the hearing of the summons, and the order asked for therein was made.

On the 10th of September 1885, the conveyance containing the covenants mentioned above was executed by Amrita Lal, as one of the executors of Anundmoye's will, and also as one of her heirs and legal representatives; by Surendra Lal, as an heir and legal representative; by Rajluckhee Dassee, as heiress and legal representative of Monohur; by the Registrar of the Court

(1) *Ante*, p. 335.

on behalf of Girendra Lal, as an heir and legal representative of Anundmoye, in pursuance of the order of the 2nd of March 1885; and by the Registrar of the Court on behalf of Dwarkanath as one of the executors of Anundmoye's will, and also as one of her heirs and legal representatives, in pursuance of the order of the 8th of September 1885.

On the 4th of July 1883, Obhoy Churn Mullick instituted a suit in the High Court (being suit No. 288 of 1883) against Dwarkanath for possession of the premises conveyed to him, (Obhoy Churn) by the Indenture of the 28th of March 1878, and for damages for breach of covenant. Dwarkanath, by his written statement, admitted the Indenture, and alleged that, in consequence of a letter he had furnished to the plaintiff, the tenants on the land had attorned to him and had paid him rent.

Obhoy Churn died intestate on the 24th of November 1883, and by an order of the 22nd of January 1884, the suit was revived in the names of his three sons—Rajendro, Debendro, and Opendro.

The suit came on for hearing on the 14th of August 1884, when it was adjourned for the amendment of the plaint in certain particulars which it is not necessary to mention.

The amendments did not appear to have been made, and on the 4th of June 1885, the suit was dismissed for default of the plaintiff's appearance. On the 26th of June 1885, Obhoy Churn's sons instituted a suit in the High Court (being suit No. 291 of 1885), against Amrita Lal, Surendra Lal, Girendra Lal, Rajluckhee Dassee, Juggutdoollub Sett, Panna Dassee, and Dwarkanath.

The plaint recited the conveyance by Dwarkanath to Obhoy Churn of the 28th of March 1878—the proceedings in the administration suit No. 470 of 1882, the proceedings in Obhoy Churn's suit against Dwarkanath No. 288 of 1883—and alleged that they were in no way bound by the proceedings in the administration suit, and that it was not competent to the defendants to cause the share in No. 22, Machooa Bazar Street, purporting to have been conveyed to Obhoy Churn by the Indenture of the 28th of March 1878 to be sold, and asked for a declaration that they were not so bound, for a stay of the sale, advertised by the Registrar, until the determination of the suit for possession of the said divided half share, and for various other reliefs.

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Notice of motion for an injunction to stay the sale was duly given ; the motion was heard on the 2nd of July 1885, and was dismissed with costs.

By an order of the 3rd of August 1885, the plaint was amended by adding the plaintiff in the present suit as a party defendant, and by alleging that he had purchased the premises No. 22, Machooa Bazar Street on the 4th of July 1885, with full knowledge of the plaintiff's claim.

The suit was tried by Trevelyan, J., who dismissed it with costs on the 20th of February 1886.

The learned Judge held that under Anundmoye's will there was a good gift of the premises No. 22, Machooa Bazar Street to the family as it existed at the time of her death, and that Dwarkanath had no authority to sell to Obhoy Churn, who, consequently, took nothing under the conveyance of the 28th of March 1878.

The Mullicks appealed against Trevelyan, J.'s decree, and the Court of Appeal (Petheram, C. J., Wilson and Norris, JJ.) reversed it, holding that the premises did not pass under the will, but that Dwarkanath took them as heir to his mother's stridhan.

The decree directed possession of a divided half share of the premises to be given to the Mullicks, and directed the present plaintiff to pay them certain mesne profits.

The only remaining facts, which it is material to mention, are that the plaintiff was uncle to Rajluckhee Dassee, and had been her manager for some seven or eight years ; that on the 21st of August 1882, the date of the plaint in the administration suit No. 470 of 1882, if not before, he became aware of the conveyance of the 28th of March 1878 ; that he was aware of all the proceedings taken in that suit, and also in Obhoy Churn's suit No. 288 of 1883, and of the application for the injunction ; and that at the sale on the 4th of July 1885, he heard Baboo Gonesh Chunder Chunder, the Mullick's attorney, state that his clients claimed a divided half share of the premises No. 22, Machooa Bazar Street.

The plaint in this suit was filed on 21st April 1888.

The defendants were Dwarkanath Bysack, Surendra Lal Bysack, Girendra Lal Bysack, Rajluckhee Dassee and Amrita Lal Bysack ; of these only Dwarkanath appeared to contest the suit at the hearing.

Mr. Bonnerjee and Mr. Sale for the plaintiff.

Mr. Pugh and Mr. O'Kinealy for the defendant Dwarkanath.

The case was opened by Mr. Bonnerjee without any reference to the question as to whether the Registrar had power to bind the defendants on whose behalf he had executed the conveyance, but during the hearing of the evidence, it was stated, in reply to the Court, that the plaintiff relied on s. 261 of the Civil Procedure Code and Rules 341 and 436 of Belchambers' Rules and Orders.

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Mr. Pugh contended on behalf of Dwarkanath Bysack that the Registrar had no authority under that section or those rules to execute the conveyance on his client's behalf, and that his client was not bound by the covenants.

Mr. Sale was heard in reply.

The nature of the arguments appears sufficiently in the judgment of the High Court, but, in addition to the authorities therein referred to, the following were cited:—

By Mr. Pugh: *Ogilvie v. Foljambe* (1); Mayne on Damages, pp. 180 and 80.

By Mr. Sale (on the question as to Dwarkanath's right to object to the order made on notice to him): *Ex parte Pratt* (2); and to *Smith v. Compton* (3); Mayne on Damages, p. 179; and Dart's Vendors and Purchasers, pp. 886 and 894.

The judgment of the Court (NORRIS, J.) was as follows:—

This was a suit to recover damages for breach of covenants for title and for quiet enjoyment. The case is one of some importance, and it is desirable to set out the facts in detail (His Lordship then proceeded to state the facts as set out above and continued):

For the plaintiff it was contended that all the defendants were liable on the covenants alluded to—Amrita Lal, Surendra Lal, and Rajluckhee—as having themselves executed the conveyance; Dwarkanath and Girendra Lal, as being bound by the execution thereof by the Registrar in their respective names.

(1) 3 Mer. 53.

(2) L. R., 12 Q. B. Div., 334.

(3) 3 B. & Ad., 407.

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Mr. Bonnerjee admitted that the Registrar's authority must rest upon statute, or upon practice or procedure having the force of statute.

The statutory authority relied on was s. 261 of the Code of Civil Procedure; the practice or procedure having the force of statute that contained in Rules 341 and 436 of Belchambers' Rules and Orders.

It was further contended for the plaintiff that the "conveyance" referred to in s. 261 of the Code of Civil Procedure, and in Rule 436, meant a deed of transfer containing a warranty, such warranty being expressed by such covenants as were necessary to secure to the grantee the estate granted; that the covenant sued on was such a covenant; and that, therefore, the Registrar had authority so to covenant on behalf of Dwarkanath and Girendra Lal.

Mr. Pugh, on the other hand, contended that the Registrar had no authority, either under s. 261 of the Code of Civil Procedure or under the Rules, to execute the conveyance on his client's behalf.

As regard s. 261, he contended that it applied only to cases where a decree had been made for specific performance; he denied that in this case there had been any "decree for the execution of a conveyance"; he denied that his client was a "judgment-debtor" within the meaning of the section, or that the plaintiff was a "decree-holder"; he further contended that if s. 261 was applicable, and if the plaintiff was a "decree-holder" and the defendant a "judgment-debtor" within the meaning of the section, yet the Registrar had no authority to act under the provisions of the section, because the procedure laid down by the section had not been followed.

As regards Rule 436, Mr. Pugh contended that it had no statutory authority, and that even if it had, and was applicable to the case, yet, as the procedure there laid down had not been complied with, the Registrar had no authority to execute the conveyance on his client's behalf.

Mr. Pugh further argued that even if, under the provisions of s. 261 and Rule 436, or either of them, the Registrar had authority to execute the conveyance on Dwarkanath's behalf,

he had only authority to execute such a conveyance as might be necessary to pass Dwarkanath's estate, and could not possibly have any authority to enter into covenants on his behalf.

And, lastly, Mr. Pugh contended that general covenants for title and quiet enjoyment did not embrace the case of a defect of title known to the purchaser before or at the date of his purchase.

I think I have correctly stated the views expressed by the respective learned Counsel.

Mr. Pugh's arguments upon s. 261 and Rule 426 are applicable to the case as against Girendra Lal as well as to that against his own client; his argument upon the question of a known defect at the date of the purchase is applicable to all of the defendants. I propose to deal in the first place with the argument common to all the defendants.

In support of it, Mr. Pugh referred to Coke on Littleton, 384A, the last page in the note; Platt on Covenants, 387; Sugden's Vendors and Purchasers, 14th Ed., 368; and, *Gas Light and Coke Company v. Towse* (1).

The passage from Platt runs as follows: "Where the title is known to be defective, the party will sometimes complete his purchase, relying on the vendor's covenants for indemnity. It must, of course, under these circumstances, be matter of express agreement, whether the vendee will take the conveyance containing covenants, with the usual qualification, or whether the covenants shall be made to extend generally to the acts of all the world. Should the seller agree to covenant against this defect specially and particularly, prudence suggests, with a view to keep the fact of unsoundness of title from the face of the purchase deed, that the indemnity should be contained in a separate instrument. Even in cases where there has been a covenant against incumbrances, it has been sometimes doubted whether that covenant would extend to protect a purchaser against incumbrances of which he had express notice."

This is, I think, a meagre authority for Mr. Pugh's contention. The case of the *Gas Light and Coke Company v. Towse* (1) does not in my opinion assist him.

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On the other hand in the last edition of Dart's Vendors and Purchasers, at page 886, it is said: "Although the fact of the purchaser having notice of a defect cannot prevent the covenants for title from extending to it, since extrinsic evidence of intention is inadmissible for the purpose of construing a deed; yet, in an action to rectify the covenant, that fact may be used as the basis of an inference, that it could not have been the intention of the parties that the covenant should include a defect of which both were equally aware. It has accordingly been suggested that, if the purchaser consents to take a defective title, in reliance on the covenant for title, so that the covenant is intended to cover a known defect, this intention should be clearly expressed in the covenant itself." And in the foot-note it is said: "It may be observed that none of the authorities warrant the proposition that it is doubtful whether the covenant would extend to a known defect."

This is, I think, a correct view of the law, and I must, therefore, hold that the covenant extends to the defect in title in consequence of which the plaintiff, though well aware of it, was dispossessed of a moiety of the premises he had purchased.

I now proceed to deal with the case as against Girendra Lal. He is a minor, and no guardian *ad litem* has been appointed, and upon this ground alone I think the suit against him should be dismissed.

But there is also another ground. For reasons which I shall presently explain, I am of opinion that the Registrar had authority to execute the conveyance on Girendra Lal's behalf; but I am clearly of opinion that he had no authority to covenant on his behalf. If authority is wanted for this proposition, it will be found in the case of *Waghela Rajsangi v. Shekh Masludjin* (1), for a reference to which I am indebted to Mr. Pugh. In that case a guardian covenanted on behalf of her infant ward to indemnify the purchaser of the ward's estate against any claim by the Government for revenue; the Judicial Committee held that it was beyond the power of the guardian to impose a personal liability on the ward.

The Registrar, in a case such as this, cannot be in a higher position than the guardian of an infant ward.

It is but right to say that the learned Counsel for the plaintiff, after argument, acquiesced in this view.

I have had considerable doubt as to whether there should not be a decree against Rajluckhee; but, upon consideration, I am of opinion that the suit as against her should be dismissed.

Rajluckhee is a *purda-nashin* lady. The only legal advice she had before she executed the conveyance was from Baboo Preo Nath Bose, the attorney of the plaintiff (who, as I have already said, is her uncle, and was for many years her manager). The evidence as to the explanation of the deed to Rajluckhee is that of her son Surendra Lal, who said: "Preo Nath Bose explained the deed to my mother."

I do not think this is sufficient. Before I can hold a *purda-nashin* lady liable upon a covenant of such unusual stringency as the covenant now sued on, I must be satisfied that she had "good independent advice in the matter," and that she clearly understood the nature of the contract she was entering into, and the liabilities she was taking upon herself.

I now come to the case against Dwarkanath. It appears that Rule 436 is based upon Statutory Enactment.

Act XXV of 1841—"An Act for amending the law concerning imprisonment for contempts of decrees or orders made by Courts of Equity"—an Act containing provisions similar to those to be found in 11 Geo. IV and 1 Wm. IV, c. 36, provided that when any person should have been directed by any decree or order in Equity of Her Majesty's Supreme Courts to execute any deed, and should have refused or neglected so to do, and had been detained in prison for two months for contempt, the Court might appoint the Master or Registrar to execute the deed.

Act V of 1855—"An Act to assimilate the process of execution on all sides of Her Majesty's Supreme Courts, and to extend and amend the provisions of Act XXV of 1841"—provided that "whenever any person has been directed by any judgment, decree, sentence, or order of any of the said Courts to execute any conveyance, and such person has refused or neglected to obey such direction, or has evaded compliance therewith either by absenting

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himself in order to avoid service of the judgment, decree, sentence or order wherein such direction is contained, or by any other means, it shall be lawful for the Court by which such direction has been given, whether the person disobeying or evading compliance with such direction is in custody or not, upon application made to the said Court for that purpose, and upon proof to its satisfaction of such default or evasion as aforesaid, to order or appoint the Registrar, Master, or other officer of the said Court to execute such conveyance."

Act XXV of 1841, in so far as it had not been repealed, and Act V of 1855, except as to the Straits Settlement, were repealed by Act VIII of 1868; but the repealing Act contained the following saving clause : " Nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed, recognised, or derived by, in, or from any enactment hereby repealed."

Act VIII of 1868 was repealed by Act XIV of 1870 ; Act XIV of 1870 by Act XII of 1873 ; Act XII of 1873 by Act XVI of 1874 ; and Act XVI of 1874 by Act XII of 1876 ; but all these Acts contain the same saving clause as is contained in Act VIII of 1868. The procedure laid down by Act V of 1855 is, therefore, still in force, and is defined in Rule 436 of Belchambers' Rules and Orders.

I am, therefore, of opinion that the order of the 8th of September 1885 was properly made, save as hereinafter mentioned, and that the Registrar had authority to execute the conveyance on behalf of Dwarkanath.

This leads me to the consideration of Mr. Pugh's objection that the form of procedure laid down in Rule 436 was not followed.

Rule 436 runs as follows : " If any person, certified by the Registrar to be a necessary party to a conveyance, be a minor, or otherwise under disability, or, being *sui juris*, shall neglect or refuse to execute the conveyance, an order may be obtained in the case of a person under disability, directing the Registrar to

execute the conveyance for him and in his name, and in other cases, directing the person to execute the conveyance within a time to be fixed by the order, and, in default thereof, directing the Registrar to execute the same for him and in his name. The application shall be on summons, and shall be supported by an affidavit or affirmation of the facts, and it shall be shown that the person required to execute the conveyance was certified by the Registrar to be a necessary party, and that the conveyance has been approved of by such party or by the Registrar. Unless otherwise ordered, the costs of such application, in the case of a person under disability, shall be part of the costs of the sale, and, in other cases, shall be borne and paid by the defaulting party."

The order of the 8th of September 1885 was not "an order directing" Dwarkanath "to execute the conveyance within a time to be fixed by the order, and, in default thereof, directing the Registrar to execute the same for him and in his name;" it was an order directing "the Registrar of the Court to approve of, and execute for, and in the name of the said defendant Dwarkanath Bysack, as one of the executors of the estate of Sreemutty Anundmoye Dassee, deceased, and also as one of her heirs and legal representatives, the conveyance of the said house and premises No. 22, Machooa Bazar Street;" nor is there any evidence of the service of the order on Dwarkanath. Mr. Pugh argued that the making of the order in the words of the rule, its service upon the defendant, or his default to obey it, were conditions precedent to the authority of the Registrar to execute the conveyance.

On the other side it was contended that, if these were conditions precedent, which was not admitted, the defendant had waived their performance by his attorney's letter of the 29th August 1885.

I think that the plaintiff's contention must prevail.

I am, therefore, of opinion that the Registrar had authority to execute the conveyance on behalf of Dwarkanath. The next point to be considered is—Had the Registrar authority to covenant on behalf of Dwarkanath?

I am of opinion that he had no such authority. Mr. Sale puts his client's case thus—"The defendant was bound to give a conveyance with the usual covenants. The covenant sued

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upon is a usual one ; and the effect of the order upon the Registrar was to direct him to do what the defendant was bound to do."

No doubt where there is a contract for the sale of immoveable property, an agreement to make a good title is implied.

The Legislature of this country has distinctly recognized this principle in the Transfer of Property Act.

But in this case there was no agreement for sale, and I am unable to construe "conveyance" in Rule 436 as meaning "conveyance executed by virtue of an agreement for sale."

I think "conveyance" in Rule 436 means such an instrument as may be necessary to transfer *A's* estate, if he has any, to *B*.

In the result then, I am of opinion that the suit must be dismissed as against Dwarkanath with costs.

There must be a decree against Amrita Lal and Surendra Lal for Rs. 4,900. I arrive at this sum in this way : the plaintiff gave Rs. 7,000 for the premises, he sold the portion of which he was not dispossessed for Rs. 3,785, the difference between these two sums is Rs. 3,215 ; I add to this Rs. 1,188 paid to Baboo Preo Nath Bose for costs in the suit brought by the Mullicks, Rs. 70 paid to Baboo Gonesh Chunder, and Rs. 437 interest on Rs. 3,215 at 6 per cent. from the 24th of September, 1886, the date of dispossession to this date. The Rs. 4,900 plus the costs on scale No 1 will carry interest at 6 per cent. from date of decree until realization.

Suit decreed in part.

Attorney for the plaintiff : Baboo D. N. Dutt.

Attorney for the defendant Dwarkanath Bysack : Baboo N. C. Bose.

H. T. H.